IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1077

JAMES D. GRAVES and ELEANOR GRAVES,

Petitioners,

v.

WHITE MOUNTAIN APACHE TRIBE, dba FORT APACHE TIMBER COMPANY, CONTINENTAL INSURANCE CO., and HAL BUTLER and PEGGY BUTLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

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Undersigned counsel, on behalf of the petitioners, petitions for a Writ of Certiorari to review the judgment of the Arizona Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Arizona Court of Appeals is reported at ___ Ariz. App. ___, 570 P.2d 803 (1977) and is printed in the Appendix. (App. A) The Order of the Superior Court, Maricopa County, granting respondents' Motion to Dismiss is not officially reported. (App. G)

JURISDICTION

The Order of the Arizona Court of Appeals (App. B) was entered on September 20, 1977. Petitioners filed a Petition for Rehearing on October 4, 1977. (App. C) On October 21, 1977, the court of appeals entered an order denying petitioner's Petition for Rehearing. (App. D) A timely Petition for Review by the Arizona Supreme Court was made (App. E) and denied on November 1, 1977. (App. F) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Does the doctrine of tribal immunity bar plaintiff's right to recover for personal injuries caused by the negligent acts of the White Mountain Apache Tribe?
2. Does the doctrine of tribal immunity extend to the Fort Apache Timber Company (hereinafter FATCO), a tribal enterprise of the White Mountain Apache Tribe?
3. Does the doctrine of tribal immunity bar plaintiff's right to recover as against Hal and Peggy Butler individually for personal injuries caused by their negligent acts as agents for the White Mountain Apache Tribe?
4. Have the respondents waived tribal immunity to the extent that they acquired liability insurance?

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant Constitutional provision is as follows:

U.S. Const., Art. I, Sec. 8, Cl. 3: To regulate commerce with foreign nations and among the several states and with the Indian tribes.

STATEMENT OF THE CASE

This suit started as a personal injury action arising out of an accident which occurred on the Fort Apache Indian Reservation. (App. A) Petitioner Darrel Graves suffered extensive personal injuries while working at the Fort Apache Timber Company (FATCO) sawmill at Cibeque, Arizona on October 6, 1971. FATCO is a tribal enterprise of the White Mountain Apache Tribe. Mr. Graves received severe injuries by coming into contact with an electric line while loading wood chips.

Suit was initially filed on November 27, 1972 in the United States District Court for the District of Arizona. Joined as defendants in the suit were Western Pine Industries, Navopache Electric Cooperative, Inc., and the White Mountain Apache Tribe d/b/a FATCO. Judge William P. Copple of the United States District Court for the District of Arizona raised the issue of the court's jurisdiction. On December 4, 1972, the court entered a memorandum and order dismissing the suit without prejudice.

Petitioners refiled their action in the United States District Court for the District of Arizona adding Continental Insurance Company and Hal Butler and Peggy Butler to the list of defendants. The jurisdictional facts alleged a substantial federal question. Judge Copple ruled that the court had jurisdiction but granted defendants' Motion to Dismiss on the grounds that the Tribe was immune from suit under the doctrine of tribal immunity.

The case was appealed to the United States Court of Appeals for the Ninth Circuit. Defendants filed a Motion to Dismiss the Appeal on the grounds that the district court did not have jurisdiction of the subject matter. On or about November 14, 1973, the United States Court of Appeals

for the Ninth Circuit granted defendants' motion.

On June 4, 1974, petitioners filed suit against all the above-mentioned defendants in the Superior Court of Arizona, Maricopa County. The Complaint alleged that the injuries sustained by Mr. Graves were due to the negligence of the defendants, except Continental Insurance Company. Defendant Hal Butler who was an agent of FATCO at the time of the accident acting in the scope of his duties and who was allegedly responsible for the negligent acts of FATCO, was sued on behalf of the community composed of himself and his wife Peggy. Continental Insurance was joined because it was a liability insurance carrier who agreed to provide FATCO with liability insurance for its negligence in the amount of $250,000.

Respondents White Mountain Apache Tribe of the Fort Apache Indian Reservation dba FATCO, Continental Insurance Company and Hal and Peggy Butler, filed a Motion to Dismiss on July 3, 1974. They contended that suit against them was barred by the federal doctrine of tribal immunity. Petitioner's Response to defendants' Motion to Dismiss claimed that the doctrine of tribal immunity deserved reconsideration in light of economic realities and that in any event, the defendants had waived immunity to the extent that they had acquired liability insurance. The Superior Court of Arizona, Maricopa County, Honorable Judge Roger Strand presiding granted defendants' Motion on February 20, 1975. (App. G)

Plaintiff appealed the granting of the Motion to Dismiss. The Arizona Court of Appeals affirmed, ___ Ariz. App. ___, 570 P.2d 803 (1977). The Court of Appeals concluded that the tribe and its operation of FATCO were immune from

suit citing *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971) and *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 423 P.2d 421 (1968). (App. A) Both *Shelley* and *Morgan* were based on the federal doctrine of tribal immunity. That doctrine holds that an Indian tribe is a dependent sovereign not subject to a state court's jurisdiction absent tribal consent or the consent of Congress. *See, e.g., Williams v. Lee*, 358 U.S. 217 (1959); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

As to Hal Butler the court held, again citing *Morgan*, that tribal immunity extended to his actions on behalf of the tribe if within the scope of his duties as an agent. (App. A)

Petitioners reemphasized in the Court of Appeals their two-pronged argument. First of all, they urged that the doctrine of tribal immunity should be reconsidered in the light of economic realities and the desire to assimilate the tribes into the mainstream of the Arizona economy. (App. A) Secondly, petitioners contended that even if tribal immunity applied to bar their action, respondents had waived this immunity to the extent that they acquired liability insurance. (App. A)

In regard to petitioners' argument that the court should reconsider the doctrine of tribal immunity in the light of economic realities, the court of appeals concluded that "this is a matter only Congress and the tribe could resolve." 570 P.2d at 805 (App. A)

As to petitioners' argument that the purchase of liability insurance by the tribe constituted a waiver of tribal immunity, the Court of Appeals recognized that there were cases

which have held that purchase of liability insurance by a municipality constitutes a waiver of municipal sovereign immunity. (App. A) *See, e.g., Beach v. City of Springfield*, 32 Ill. App. 2d 256, 177 N.E.2d 435 (1961); *Collins v. Memorial Hospital of Sheridan County*, 521 P.2d 1329 (Wyo. 1974). Nevertheless, the court was unwilling to apply the rationale of these cases to the doctrine of tribal immunity. They reasoned as follows:

> Congress had not waived the immunity in this case nor are we able to do so in the face of Art. 1, § 8, Clause 3, of the United States Constitution and the authorities interpreting this clause beginning with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which would not permit this Court to do so.

570 P.2d at 805.

Petitioners filed a Petition for Rehearing on October 4, 1977 (App. C) asking the Court of Appeals to reconsider its opinion in light of this Court's decision in *Puyallup Tribe v. Washington Game Department*, ___ U.S. ___, 53 L. Ed. 2d 667 (1977). Petitioners argued that *Puyallup III* indicates that the continuing validity of the tribal immunity doctrine is in doubt and that, at the very least, the doctrine allows a state to obtain jurisdiction over individual defendants despite tribal immunity. Thus, it was argued that the dismissal of the defendants Continental Insurance and Hal Butler was improvident.

Petitioners' Motion for Rehearing was considered and denied without an opinion being expressed on October 20, 1977. (App. D)

Finally, petitioners sought review in the Arizona Supreme Court. (App. E) Their Petition for Review was denied on November 1, 1977. (App. F)

REASONS FOR GRANTING THE PETITION

Certiorari should be granted in this case because the decision poses an important and substantial federal question. The decision of the Arizona Court of Appeals in this case illustrates the traditional approach that courts taken when asked to subject indian tribes to civil suits in state or federal courts. *See United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Turner v. United States and Creek Nations of Indians*, 248 U.S. 354 (1919); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957); *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908); *Thebo v. Choctaw Tribe*, 66 F.2d 372 (8th Cir. 1895).

The traditional view that indian tribes are immune from suit absent Congressional authorization, has come under considerable attack and members of this Court have expressed doubt as to its continuing vitality. Chief Justice Blackmun in his concurring opinion in *Puyallup Tribe v. Washington Game Department*, ___ U.S. ___, 53 L. Ed. 2d 667 wrote:

> I join the Court's opinion. I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 84 L.Ed. 894, 60 S. Ct. 653 (1940). I am of the view that that doctrine may well merit re-examination in an appropriate case.

___ U.S. ___, 53 L. Ed. 2d at 678.

The origin of tribal immunity as a recognized legal concept is found in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) where the Court stated:

> The Indian nations had always been considered an distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of

> the soil, from time immemorial, with the single exception of that imposed by irresistible power. . . .

31 U.S. (6 Pet.) at 559.

In *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908) the court stated the true rationale for applying the doctrine of tribal immunity to Indian nations as follows:

> Upon consideration of public policy, such Indian Tribes are exempt from civil suit. That has been the settled doctrine of the government from the beginning. If any other course was adopted, the tribes would soon be overwhelmed with civil litigation and judgments.

165 F. at 308.

The justification for protecting the indian tribes through the doctrine of tribal immunity is no longer present. The status of the tribes is different than it was 100 years ago. Their relationship with the federal government has been a changing one and the trend has been towards decreased federal control and increased local control of Indians. This is evidenced by the Wheeler-Howard Act, 48 Stat. 984, as amended, 49 Stat. 378, enacted in 1934 for the purpose of promoting local control of economic development and local self-government among Indians. *See* Kelly, *Indian Adjustment and the History of Indian Affairs*, 10 Ariz. L. Rev. at 559 (1968); and the Indian Civil Rights Act, 25 U.S.C.A. § 1301, *et seq.*, enacted in 1968, whereby Indians were extended various constitutional protections and the path was opened for state assumption of jurisdiction over Indians by states willing to do so. *See* Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 Ariz. L. Rev. 617 (1968).

As a result, the policy toward Indian tribes has evolved

from one of protection of a weak and helpless subservant, to one of encouragement of economic development. This in turn, promotes the interrelationship of the tribes and the communities surrounding them. Congress has followed a policy calculated to make all indians full fledged participants in American society. See, *Sovereign Immunity for Tribal Businesses*, 13 Ariz. L. Rev. 523 at 527 (1971); and *Federal Indian Law* (1958) pp. 491-492.

The White Mountain Apache Tribe was never recognized by executive order defining and providing for the Fort Apache Indian Reservation. The Tribe is now organized under § 16 of the Indian Reorganization (Wheeler-Howard) Act, 48 Stat. 984, as amended, 49 Stat. 378. The Apache Tribe's Constitution, Article 5, § 1, authorized it to set up subordinate economic organizations of which FATCO is one of many such organizations. For a discussion of the relationship of FATCO to the Apache Tribe see *Sovereign Immunity for Tribal Businesses*, 13 Ariz. L. Rev. 523, 525, fn. 11-13 (1971).

The tribes are not the same entities which the Court dealt with in *Worcester v. Georgia, supra.* The tribes are shedding their ties with the Federal Government, assuming more responsibilities and forming more relationships with the states in which they are located. They are no longer weak dependents whose existence is being threatened on every side by non-Indians. The Apache Tribe is a sleeping giant of economical development which deals with the non-Indian community, not as a weak victim of non-Indian businesses but as a partner with the off reservation community. *See* Bennett, *Problems and Prospects in Developing Indian Communities*, 10 Ariz. L. Rev. 649 (1968).

If applied today, the doctrine of tribal immunity would protect Indian tribes from evils which do not exist. Because of the doctrine, third parties are not protected when dealing with the tribes. Consequently, integration of the tribes into the mainstream of the American economy is slowed by the reluctance of outsiders to deal with them. The time is ripe for this Court to recognize this and put some limitation on the exercise of that doctrine as a defense to suits against the tribes and their business enterprises.

Even if the doctrine of tribal immunity is to retain its vitality, important federal questions as to the extent of that doctrine remain: Can tribal businesses and individuals assert tribal immunity to bar claims against them? In its latest pronouncement, this Court in *Puyallup Tribe v. Washington Game Dept., supra,* at 674 indicated that the states might be able to assert jurisdiction over individuals despite their assertions of tribal immunity when it stated:

> On the other hand, the successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained jurisdiction.

Finally, this case raises an important federal question as to under what circumstances the doctrine of tribal immunity can be waived. In *Puyallup Tribe v. Washington Game Dept., supra,* at 674 this Court stated:

> Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.

As to what actions by an Indian tribe constitute an effective waiver of the doctrine of tribal immunity, there is a dearth of authority. This case affords the Court an appro-

tunity to explore and define that area. Moreover, waiver of tribal immunity by the procurement of liability insurance is an equitable solution to the problem in this case.

CONCLUSION

For foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the Arizona Court of Appeals.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A	Arizona Court of Appeals Opinion
APPENDIX B	Arizona Court of Appeals Order
APPENDIX C	Petitioners' Petition for Rehearing
APPENDIX D	Order of the Arizona Court of Appeals Denying Petitioners' Petition for Rehearing
APPENDIX E	Petitioners' Petition for Review by the Arizona Supreme Court
APPENDIX F	Order of the Arizona Supreme Court Denying Petitioners' Petition for Review
APPENDIX G	Order of the Superior Court Granting Respondents' Motion to Dismiss

APPENDIX A

(Title of Action)

OPINION

DONOFRIO, Judge

This is an appeal by the plaintiffs below from the trial court's order granting a motion to dismiss their complaint with prejudice. The complaint was filed by the plaintiffs against The White Mountain Apache Tribe of Fort Apache Indian Reservation, an Indian Nation d/b/a Fort Apache Timber Company, Continental Insurance Company, a New Yrok [sic] corporation and Hal Butler and his wife Peggy Butler, all defendants below.

We are called upon to determine whether the trial court erred in its ruling by applying the doctrine of tribal immunity to bar plaintiffs' cause of action against the Indian tribe, its agent and the insurance carrier.

The suit was filed as a personal injury action arising out of an accident which occurred on the Indian reservation. Plaintiff, James D. Graves, received his injuries by coming into contact with an electric line while working at loading wood chips at the Fort Apache Timber Company (FATCO) sawmill at Cibeque, Arizona. The complaint alleged that the injuries were by virtue of the negligence of FATCO which is a tribal enterprise of the White Mountain Apache Tribe; that Continental Insurance Company insured said tribe against liability for the negligent acts of the tribe, its agents and employees; and that Hal Butler on behalf of the community composed of himself and wife, Peggy, was sued as the agent of the tribe acting in the scope of his duties and in furtherance thereof.

Appellant's attack on the trial court's ruling is two-pronged: First, they urge that this Court reconsider the doctrine of tribal immunity in the light of economic realities and that this Court do away with or limit the application of the doctrine in this case. They urge that by immunizing the tribes from these types of lawsuits the courts are not accomplishing the goals of furthering tribal interests. They contend that because of the doctrine of immunity third parties are not protected when dealing with the tribes. Consequently, they say, integration of the tribe into the mainstream of the Arizona economy is slowed down by the reluctance of outsiders to deal with the Indian tribes because of this. Secondly, they contend that we should hold with the rationale, adopted elsewhere, namely, that a sovereign waives the protection of sovereign immunity to the extent that it acquires liability insurance. See, e.g., BEACH v. CITY OF SPRINGFIELD, 32 Ill. App. 2d 256, 177 N.E.2d 436 (1961).

Appellees on the other hand defend the trial court's ruling on the basis that our Supreme Court has passed upon the same issues and that the tribe and its operation of FATCO are immune from suit citing WHITE MOUNTAIN APACHE TRIBE v. SHELLEY, 107 Ariz. 4, 480 P.2d 654 (1971), and MORGAN v. COLORADO RIVER INDIAN TRIBE, 103 Ariz. 425, 443 P.2d 421 (1968). We agree with appellees.

In SHELLEY governmental immunity was held to apply to FATCO and to the General Manager (Butler)[1/] for his actions on behalf of the tribe if done within the scope of his duties as such agent. In MORGAN such executive immunity

[1/] It is to be noted that the name Hal Butler is the same in both SHELLEY, supra, and the present case, and that he is sued as the agent of the tribe in both cases.

was held to apply in tort cases. Appellants do not question these holdings but are urging that since this case has the additional fact situation of the tribe purchasing liability insurance covering negligence that we should rule differently. In other words, that we should adopt the reasoning of certain cases involving the waiver of municipal sovereign immunity and hold that the tribe by taking out insurance has waived its governmental immunity. We do not agree with appellants.

With reference to the argument concerning the slowing down of the integration of the tribe into the mainstream of the Arizona economy, i.e., the clash between the policies protecting Indians and those seeking to have them assimilated into the general population, this is a matter only Congress and the tribe can resolve, and it is not for this Court to make such a determination. When this Court attempted to review former Supreme Court opinions in the light of changing problems in our society our Supreme Court in McKAY v. INDUSTRIAL COMMISSION, 103 Ariz. 191, 438 P.2d 757 (1968), in no uncertain terms let us know:

> "Whether prior decisions of the highest court in the state are to be disaffirmed is a question for the court which makes the decision. Any other rule would lead to chaos in our judicial system."

Finally, we turn to the remaining question as to whether the existence of liability insurance purchased by the tribe amounted to a waiver by the tribe of its governmental immunity. We think not.

First, there is nothing in the record referring to any congressional act, or to any act by the tribe, waiving the tribal immunity. In MORGAN, supra, the Supreme Court held that the Colorado River Indian Tribe, being a dependent

soveriegn-immune from suit, could not be subjected to the jurisdiction of our Court without its consent or the consent of Congress. The same rule would apply here. There being nothing to show waiver or consent by the tribe, the tribe would still enjoy the immunity.

Although there are cases, such as BEACH v. CITY OF SPRINGFIELD, supra, and COLLINS v. MEMORIAL HOSPITAL OF SHERIDAN COUNTY, Wyo. 521 P.2d 1339 (1974), which have held that the purchase of liability insurance constitutes a waiver of municipal sovereign immunity, at least up to the amount of coverage, we are unable to see how we can apply the rationale of these cases to the instant case which involves tribunal immunity, especially since Congress has not waived the immunity in this case nor are we able to do so in the face of Art. 1, §8, Clause 3 of the United States Constitution and the authorities interpreting this clause beginning with the case of WORCESTER v. GEORGIA, 31 U.S. (6Pet.) 515 (1832), which would not permit this Court to do so.

Affirmed.

/s/ Francis J. Donofrio
FRANCIS J. DONOFRIO, Judge

CONCURRING:

/s/ Gary K. Nelson
GARY K. NELSON
Presiding Judge, Department A

/s/ Jack J. Ogg
JACK L. OGG, Judge

APPENDIX B

(Title of Action)

ORDER

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the opinion be sent to each party appearing herein or to the attorney for such party and to The Honorable Roger G. Strand, Judge.

DATED this 20th day of SEPTEMBER, 1977.

/s/ Gary K. Nelson
GARY K. NELSON
Presiding Judge, Department A

[Verification of mailing to counsel of record and Maricopa County Superior Court Judge Strand.]

APPENDIX C

(Title of Action)

PETITION FOR REHEARING

I

The Appellant-Plaintiff, JAMES D. GRAVES by and through his attorneys, requests that this Court grant a rehearing from its decision entered on September 20, 1977. The Court should reverse this decision and hold that the doctrine of tribal sovereign immunity does not apply or, in the alternative, that tribal immunity does not apply to any of the Defendants other than the tribe itself.

II

This Court held in its decision that the Defendants were not liable for their negligent acts occurring on the Indian reservation because the Defendants are protected by the doctrine of tribunal immunity which has been applied by the Arizona Supreme Court in Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480, P.2d 654 (1971) and Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968). In each of these cases, the Supreme Court applied the tribal immunity doctrine as stated by the United States Supreme Court in United States v. United States Fidelity & Guaranty Co., 309 US 506, 60 S.Ct. 653, 84 L. Ed. 894 (1940).

The Supreme Court has, however, recently entered its opinion in Puyallup Tribe, Inc. v. Washington, ___ US ___ 53 L. Ed. 2d 667, 97 S. Ct. ___ (1977) (Puyallup III) which is relevant to the issues before this Court and which was decided since the time that the briefs were filed in this matter. The Supreme Court indicated that the tribal immunity

doctrine and its continuing validity are in doubt. The Court rejected the argument that the State of Washington could not exercise jurisdiction over the Indians because of the tribal immunity doctrine enunciated in United States v. United States Fidelity & Guaranty Co., supra. The Court further indicated that a state, at the very least, has jurisdiction over individual defendants despite tribal immunity. The Court held in that case that the State of Washington could enforce its fish and game laws by exercising its power over individual fish and game laws by exercising its power over individual Indians and their on-reservation activities.

In rejecting the claim that Washington could enforce its laws on the reservation, the Court stated:

> [W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissable. The doctrine of sovereign immunity which was applied in United States v. United States Fidelity & Guaranty Co. 309 US 506, 87 L. Ed. 894, 60 S. Ct. 653, does not immunize the individual Members of the Tribe.

53 L. Ed. 2d at 673.

> [T]he successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained jurisdiction. . . . Only the portions of the State Court Order that involve relief against the Tribe itself must be vacated in order to honor the Tribe's valid claim of immunity.

53 L. Ed. 2d at 674. (emphasis added).

It is interesting to note that in a separate concurring opinion in Puyallup III, Justin Blackmun stated:

> I join the Court's opinion, I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in United States v. United States Fidelity & Guaranty Co., 309 US 506, 84 L. Ed. 2d 894, 60 S. Ct. 653 (1940). I am of the view that that doctrine may well merit re-examination in an appropriate case.

53 L. Ed. 2d at 678.

This Court should apply the doctrine of tribal immunity to prohibit the exercise of jurisdiction over the tribe because the Supreme Court itself has indicated that the doctrine may no longer exist. Applying the rationale of that case to the facts before this Court, it becomes apparent that the Court's decision should be modified to the extent it affirms the dismissal of the Defendants CONTINENTAL INSURANCE and HAL BUTLER himself was negligent and that CONTINENTAL is also individually liable.

The Court should also grant a rehearing to the extent that its decision failed to consider the question of whether the insurance carrier, CONTINENTAL, is estopped from asserting that the tribe is immune in view of the fact that the carrier accepted premiums to provide liability protection. Even if the Court finds tribal immunity, CONTINENTAL may be estopped from raising immunity as a defense, at least to the extent of the liability insurance, CONTINENTAL, was supposedly providing.

DATED this 4th day of October, 1977.

MEYER & VUCICHEVICH, P.C.

/s/ Henry G. Hester

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[Verification of delivery and mailing]

APPENDIX D

(Title of Action)

ORDER

Appellants' petition for rehearing has been considered by Presiding Judge Nelson, and Judges Donofrio and Ogg.

IT IS ORDERED denying the petition for rehearing.

DATED this 20th day of October, 1977.

/s/ Gary K. Nelson

GARY K. NELSON
Presiding Judge, Department A

[Verification of mailing]

APPENDIX E

(Title of Action)

PETITION FOR REVIEW PURSUANT TO
RULE 47(b), RULES OF THE COURT
OF APPEALS
17A, A.R.S.

The Court of Appeals of the State of Arizona, Division One, Department A, having on the 20th day of October, 1977, denied the Motion for Rehearing filed on behalf of Appellants herein,

Comes now the Appellants herein, JAMES D. GRAVES and ELEANOR GRAVES, and pursuant to Rule 47(b) of the Rules of the Court of Appeals, 17A, A.R.S., hereby petitions for review by the Supreme Court of the State of Arizona.

Respectfully submitted this 21st day of October, 1977.

MEYER & VUCICHEVICH, P.C.

/s/ Henry G. Hester

Henry G. Hester
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Attorneys for Appellants

[Verification of mailing]

APPENDIX F

(Title of Action)

The following action was taken by the Supreme Court of the State of Arizona on November 1, 1977 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 2nd day of November, 1977.

CLIFFORD H. WARD, Clerk
By /s/ Becky Sanchez
Deputy Clerk

[Verification of service]

APPENDIX G

(Title of Action)

ORDER GRANTING
MOTION TO DISMISS

Defendants The White Mountain Apache Tribe of the Fort Apache Indian Reservation, an Indian Nation, d/b/a Fort Apache Timber Company, Continental Insurance Company, a New York corporation, and Hal Butler and Peggy Butler having come on for hearing on their motion to dismiss before this court on August 8, 1974; the court having read all the memoranda of counsel with respect thereto and having heard oral argument; the court having taken this matter under advisement and having now entered its order granting these defendants' motion to dismiss plaintiff's complaint with prejudice; and the court having determined, and hereby certifying, that, pursuant to Rule 54(b), Arizona Rules of Civil Procedure, there is no just reason for delay and that judgment should be entered forthwith against plaintiffs dismissing their claim with prejudice; and the court being fully advised in the premises:

IT IS HEREBY ORDERED that the motion to dismiss of defendants The White Mountain Apache Tribe of the Fort Apache Indian Reservation, an Indian Nation, d/b/a Fort Apache Timber Company, Continental Insurance Company, a New York corporation, and Hal Butler and Peggy Butler be and the same is hereby granted and that plaintiffs' complaint is dismissed with prejudice as to these defendants and, pursuant to Rule 54(b), Arizona Rules of Civil Procedure, there is no just reason for delay and that this order granting these defendants' motion to dismiss and

adjudging that plaintiffs' complaint be dismissed with prejudice should forthwith be entered against plaintiffs dismissing their claim with prejudice.

DONE IN OPEN COURT this 19th day of Feburary, 1975.

/s/ Roger G. Strand
JUDGE

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BRIEF FOR RESPONDENTS IN OPPOSITION

[redacted]

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ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents White Mountain Apache Tribe, dba Fort Apache Timber Company, Continental Insurance Co., and Hal Butler and Peggy Butler request that the Petition for Writ of Certiorari in this matter be denied.

OPINION BELOW

The reported opinion of the Arizona Court of Appeals appears in the Appendix to the Petition, pages A-1 to A-4 and is reported at ___ Ariz. App. ___, 570 P.2d 803 (1977).

JURISDICTION

The Arizona Court of Appeals entered its order in Respondents' favor on September 20, 1977. A Petition for Rehearing was filed with the Arizona Court of Appeals by Petitioners on October 4, 1977, and on October 20, 1977 the Arizona Court of Appeals entered its order denying the Petition for Rehearing. A Petition for Review to the Arizona Supreme Court was filed on October 21, 1977 and denied by the Arizona Supreme Court on November 1, 1977. This Court has jurisdiction under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The Petition for Certiorari enumerates four "Questions Presented." Question (1) asks this Court to overrule the long standing doctrine of tribal immunity. The remaining questions (2, 3, and 4) are but variations on a single theme, that the tribe waived its right to rely on its immunity from civil suit by engaging in business activities and purchasing liability insurance. Insofar as the Respondents are concerned, the only real question before this Court is:

Was the Arizona Court of Appeals correct in affirming the trial court's judgment that the doctrine of tribal immunity bars Petitioners' cause of action for personal injuries against the tribe, its agents and its insurance carrier.

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, Sec. 8, Cl. 3 of the United States Constitution provides:

> "The Congress shall have Power . . . to regulate commerce with foreign nations and among the several states and with the Indian tribes."

STATUTE INVOLVED

There are no Federal statutes involved.

STATEMENT OF THE CASE

Respondents adopt Petitioners' Statement of Case with the following minor corrections:

(1) The Order of the Arizona Court of Appeals denying the Petition for Rehearing is dated October 20, 1977 (not October 21); and (2) the date of Petitioners' accident, which is the basis for this petition, is October 6, 1972 (not 1971).

REASONS FOR DENYING THE WRIT

A. The State Courts Properly Analyzed the Questions of Law Involved and Should Not be Reviewed Here.

The Superior Court of Arizona and the Arizona Court of Appeals properly analyzed the factual situation presented and held, following a long line of United States Supreme Court cases beginning with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 512 (1832), that Indian Tribes enjoy immunity from civil suit. The state courts properly analyzed Petitioners' argument that changing economic circumstances and purchase of liability insurance would not be grounds to reverse this Court and the Congress. In discussing Petitioners' attack on the trial court's ruling upholding the doctrine of tribal immunity, the Arizona Court of Appeals found that the doctrine of tribal immunity applied to the White Mountain Apache Tribe, to the Fort Apache Timber Company (FATCO) and to its general manager, respondent Hal Butler and his wife. With respect to the argument that the economic

realities of the twentieth century required the abandonment of the doctrine of tribal immunity, the Arizona Court of of Appeals said:

> "With reference to the argument concerning the slowing down of the integration of the tribe into the mainstream of the Arizona economy, i.e., the clash between the policies protecting Indians and those seeking to have them assimilated into the general population, this is a matter only Congress and the tribe can resolve, and it is not for this Court to make such a determination."

This decision was correct and should not be reviewed.

With respect to the argument that the purchase of liability insurance waived the doctrine of tribal immunity, the Arizona Court of Appeals simply stated:

> "[W]e are unable to see how we can apply the rationale of these cases to the instant case which involves tribunal immunity, especially since Congress has not waived the immunity in this case nor are we able to do so in the face of Art. 1, § 8, Clause 3 of the United States Constitution and the authorities interpreting this clause beginning with the case of WORCESTER v. GEORGIA, 31 U.S. (6 Pet.) 515 (1832), which would not permit this court to do so."

All of the reasons that Petitioners have put forth for abrogating the doctrine of tribal immunity, are reasons which should be presented to the Congress, and not to this Court. As the Arizona Supreme Court properly pointed out in *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971), the courts are without power to abrogate the doctrine of tribal immunity unless Congress consents.

> "It is the opinion of this court that FATCO is a part of the TRIBE and as such enjoys the same immunity from suit that the TRIBE enjoys absent . . . the

> consent of Congress to waive this immunity." [*White Mountain Apache Indian Tribe v. Shelley, supra*, 107 Ariz. at 7, 480 P.2d at 657]

Even the law review article critical of the decision in *White Mountain Apache Indian Tribe v. Shelley, supra*, recognized that it was up to Congress, and not the courts, to change the doctrine of tribal immunity. The author stated in 13 *Ariz. L. Rev.* 523 at 527 (1971):

> "Today the concept of the Indian as a helpless ward has run full tilt into the demand that the Indian be treated as a fully responsible, first-class citizen. *Only the Congress has the authority to resolve the impasse.*"

B. Petitioners' Argument as to Waiver by Purchase of Liability Insurance Was Properly Decided by the State Courts.

The argument that the Tribe waived its immunity by purchasing liability insurance, is one which is properly directed to the state and not the federal judiciary. Respondents do not concede that the Tribe could waive its immunity by purchasing liability insurance absent the consent of Congress. However, assuming *arguendo* that such is the case, the question of whether the purchase of liability insurance acts as such a waiver is a proper question for the state courts and does not raise a federal question. Furthermore, most recent cases have held that a municipality or other governmental agencies' procurement of liability insurance does not have any effect on its immunity from tort liability in that particular jurisdiction. For example see, *Powers v. Telander*, 129 Ill. App. 2d 10, 262 N.E.2d 342 (1970); *Anderson v. Calmus Community School Dist.*, 174 N.W.2d 643 (Iowa 1970); *Allen v. Ogden*, 219 Kan. 136, 499 P.2d 527 (1972); *Moore v. Fayette County*, 418 S.W.2d 412 (Ky. 1967); *Quecedo v. Montgomery County*, 264 Md. 590, 287 A.2d 257 (1972);

Cody v. Southfield-Lathrup School Dist., 25 Mich. App. 33, 181 N.W.2d 81 (1970); *Hughes v. County of Burlington*, 99 N.J. Super. 405, 240 A.2d 177 (1968); *Chavez v. Mountainair School Board*, 80 N.M. App. 450, 457 P.2d 382 (1969); *Rich v. Goldsboro*, 282 N.C. 383, 192 S.E.2d 824 (1972); *Henry v. Oklahoma Turnpike Authority*, 478 P.2d 898 (Okla. 1970); *Lovirnoff v. Helms Express, Inc.*, 309 F. Supp. 145 (W.D. Pa. 1970); and, *Fesal v. Hutchinson County*, 443 S.W.2d 937 (Tex. Civ. App. 1969). See also, *Prosser, Law of Torts* § 83, p. 555 (4th ed. 1971); and, *Annot.*, 68 A.L.R.2d 1436 (1959).

C. Immunity of Tribe from Personal Injury Action Does Not Raise Federal Question.

This is not a proper case to review the long standing doctrine of tribal immunity inasmuch as it involves an action for personal injuries and does not raise substantial economic and tribal policy questions which Petitioners argue may make the doctrine of tribal immunity invalid in the twentieth century. This is merely a personal injury action brought against various entities including Respondents herein. This is not the proper type of case to grant certiorari and to review the entire policy of tribal immunity inasmuch as it does not have a substantial economic or other impact that Petitioners claim. Furthermore, under Arizona law, a tribe, absent the consent of Congress, is immune from suit for personal injuries. *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968).

CONCLUSION

Petitioners have fully failed to sustain their burden of establishing, under Rule 19, that there are "special and

important reasons" why the Writ should be granted. The decision of the Arizona Court of Appeals affirmed the long standing rule of this Court that Indian Tribes, absent consent of Congress, cannot be subject to suit for personal injuries. Petitioners have pointed to no conflict on this question in the various states, or in the Circuit Court of Appeals which conflicts with the ruling in the instant matter. The Arizona Court of Appeals correctly held that the trial court properly granted the Tribe, its general manager, and its insurance carrier immunity from suit for a personal injury action. It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,
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